No. 76-169

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH BARLETTA

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS FONTANELLO

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROBERT H. BORK,
Solicitor General,
RICHARD L. THORNBURGH,
Assistant Attorney General,
JEROME M. FEIT,
DENNIS A. WINSTON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH BARLETTA

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS FONTANELLO

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for writs of certiorari to review the judgments of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1a–22a) is reported at 533 F. 2d 1395. The opinions of the district court (App. D., *infra,* pp. 27a–30a) are not reported.

JURISDICTION

The judgments of the court of appeals (App. B, *infra*, pp. 23a–24a) were entered on April 16, 1976. A petition for rehearing was denied on June 9, 1976 (App. C, *infra*, p. 25a). On June 30, 1976, Mr. Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including August 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government has the duty under 18 U.S.C. 2518(8)(d) to advise the district court of the identity of every person whose conversation has been overheard in the course of a wire interception so that the court may determine whether to require that such person be served with notice of the interception.

2. Whether, assuming that the government has such a statutory duty, reversal of the convictions of persons whose names were not disclosed was proper in the absence of a showing of prejudice resulting from the non-disclosure.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in Appendix E, *infra*, pp. 31a–35a.

STATEMENT

After jury-waived trials in the United States District Court for the Western District of Missouri, respondents were convicted, together with Nicholas Civella, Anthony Thomas Civella, and Frank Anthony

Tousa, of conspiracy to conduct an illegal gambling business and of using facilities of interstate commerce in furtherance thereof, in violation of 18 U.S.C. 371, 1084(a) and 1952.[1] Respondent Barletta was sentenced to two years' imprisonment. Respondent Fontanello was sentenced to 42 months' imprisonment and fined $2,000. On April 16, 1976, the court of appeals affirmed the convictions of the Civellas and Tousa but reversed respondents' convictions and ordered that judgments of acquittal be entered as to them (App. A, *infra*, p. 22a; App. B, *infra*, pp. 23a–24a).[2]

1. On January 7, 1970, Judge William Collinson of the United States District Court for the Western District of Missouri issued an order pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, *et seq.*, authorizing the interception of wire communications of Frank Tousa over a telephone at the Northside Social Club in Kansas City, Missouri (App. A, *infra*, pp. 3a, 5a). The interception was authorized for a period of ten days beginning on January 8, 1970; it ended by January 17, 1970 (*ibid.*).

Acting pursuant to 18 U.S.C. 2518(8)(d), Judge Collinson ordered inventories served on Tousa (who alone had been named in the wire interception application and order), the Civellas, and others who were not indicted, informing them that certain of their communications had been intercepted. No inventory notice was ordered for or given to respondents (App.

---

[1] The Civellas and Tousa have petitioned for a writ of certiorari (No. 75–1813).

[2] On July 16, 1976, Mr. Justice Blackmun stayed the execution of these orders pending this Court's disposition of this petition.

A, *infra,* p. 6a). In October 1970 and March 1971, successive indictments (neither of which named respondents) were filed against Tousa and the Civellas (*ibid.*). In October 1971, a final superseding indictment was returned naming among others, Tousa, the Civellas and respondents (App. A, *infra,* pp. 2a, 6a).[3]

2. As established by stipulation,[4] the facts revealed that between July 1968 and January 1970 the defendants were involved in a large scale gambling operation that entailed wagering on various athletic contests (App. A, *infra,* pp. 4a–5a). The operation was run primarily for the benefit of Nicholas Civella (owner of the Northside Social Club) by Tousa and Nicholas' nephew, Anthony Civella.

As their part in the conspiracy, respondents accepted bets on behalf of the operation (R. 1097). In addition, Fontanello advised Tousa regarding the setting of odds or "betting line" on the events and assisted in placing bets with other bookies to protect against potential losses (R. 4).

3. Section 2518(8)(d) provides for the service of inventory notices on "the persons named in the [intercept] order * * * and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice." Respondents were neither named in the intercept order nor identified in Judge Collinson's order directing the service of inventory notices.[5] The court of appeals nevertheless concluded that as to respondents "no effort was made to comply with the inventory requirements of the statute * * * [and thus the] wiretap evidence should have been suppressed as to them." (App. A, *infra,* p. 21a). It reversed their convictions and ordered the entry of judgments of acquittal.

[3] During pretrial discovery, before December 1971, respondents were informed of the interceptions and allowed to listen to the tapes of their conversations; they were tried in May 1975 (R. 234).

[4] Respondent Barletta joined with Tousa and the Civellas in the stipulation. Respondent Fontanello also joined, except as to those facts which established his involvement in the conspiracy he admitted existed (App. A, *infra,* pp. 2a–3a; App. D, *infra,* p. 29a). Fontanello was tried separately before Judge Collinson; the government introduced a tape recording of a conversation between Fontanello and Tousa over the monitored telephone, which established Fontanello's guilt (App. D, *infra,* p. 29a).

REASONS FOR GRANTING THE WRITS

The issue presented by this case—concerning the propriety of suppression of telephone conversations intercepted pursuant to court order when the individuals have not received inventory notices—is presently before this Court in *United States* v. *Donovan,* No. 75–212, certiorari granted, February 23, 1976.

[5] The record does not show whether respondents' names were given to Judge Collinson as persons whose conversations had been intercepted, and a search of the government's files has not disclosed whether the judge was supplied with their names. The court of appeals, although not specifically so asserting, must have assumed that the names were not supplied, and we cannot dispute this assumption. We note, however, that Judge Collinson was aware from the interim report of January 14, 1970, on the progress of the intereception that in the intercepted conversations Tousa was overheard "disseminat[ing] the 'betting line' to numerous sub-agents and * * * accept[ing] wagers [from them]" (R. 374). Respondents were among those sub-agents; apparently Judge Collinson did not request, and no attempt was made to provide him with, a comprehensive list of all the identifiable sub-agents overheard.

For the reasons set forth in our brief in *Donovan,* a copy of which we are sending to respondents, we believe that the statute does not require that the issuing judge be informed of the names of persons overheard who were not named in the intercept order. But even if the statute does require that the judge be so informed, we further argue that suppression of the intercepted conversations is neither authorized by statute nor justified in policy for procedural defects of this nature, particularly in the absence of any showing either of government bad faith or prejudice to the defendant from the failure to receive the inventory notice.[6] Therefore, we believe the court of appeals incorrectly concluded that the intercept evidence against respondents should have been suppressed.

Whether we are right or wrong in these contentions will be determined by this Court in *Donovan,* and the result of that case will control the disposition of the instant petition. If this Court resolves the inventory notice issue in *Donovan* in the government's favor, the decision here cannot stand, and certiorari should be granted in this case and the case remanded to the court of appeals. On the other hand, should the court of appeals' ruling in *Donovan* on the inventory notice issue be sustained, the instant petition for a writ of certiorari should be denied.

---

[6] In light of respondents' relationship with Tousa, it is difficult to believe that respondents did not learn of the interceptions soon after the inventory notice was served on Tousa in 1970. At any rate, it is clear that they were fully informed of the interceptions more than three and one-half years before trial. See p. 4, n. 3, *supra.*

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be disposed of as the Court deems appropriate in light of its decision in *United States* v. *Donovan,* No. 75–212.

ROBERT H. BORK,
Solicitor General.
RICHARD L. THORNBURGH,
Assistant Attorney General.
JEROME M. FEIT,
DENNIS A. WINSTON,
Attorneys.

AUGUST 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-1522
United States of America,
Appellee,
v.
Nicholas Civella,
Appellant.

No. 75-1525
United States of America,
Appellee,
v.
Anthony Thomas Civella,
Appellant.

No. 75-1528
United States of America,
Appellee,
v.
Frank Anthony Tousa,
Appellant.

No. 75-1530
United States of America,
Appellee,
v.
Joseph Barletta,
Appellant.

No. 75-1532
United States of America,
Appellee,
v.
Thomas Fontanello,
Appellant.

Appeals from the United States District Court for the Western District of Missouri.

217-082 O - 76 - 2

Submitted: December 11, 1975
Filed: April 16, 1976

Before LAY, BRIGHT and HENLEY, Circuit Judges.

HENLEY, Circuit Judge.

These five consolidated appeals come to us from the United States District Court for the Western District of Missouri. The defendants, Nicholas Civella, his nephew, Anthony Thomas Civella, Frank Anthony Tousa, Joseph Barletta and Thomas Fontanello, along with Martin Chess and Phillip Saladino, were jointly charged in the fifth court of a five count indictment with having unlawfully conspired in violation of 18 U.S.C. § 371 to violate the provisions of 18 U.S.C § 1084 and 18 U.S.C. § 1952.[1] The charge against the Civellas, Tousa and Barletta was submitted to District Judge William R. Collinson on a stipulation of facts entered into subject to defense contentions put forward in

[1] Section 1084(a) makes it an offense for any person who is engaged in the business of betting or wagering knowingly to use a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers. Section 1084(b) provides that nothing in the section is to be construed as prohibiting the interstate or foreign transmission of news reports concerning sporting events or information dealing with betting or wagering on a sporting event from a state in which betting or wagering on the event in question is legal to a state in which betting or wagering on the event is also legal.

Section 1952 makes it a federal crime for any person to travel in interstate commerce or to use any facility of interstate commerce, including the mail, to distribute the proceeds of any unlawful activity or to otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of any unlawful activity.

numerous pretrial motions which were denied by the district court.[2] Fontanello joined in certain paragraphs of the stipulation but refused to join in others; his case was tried to Judge Collinson without a jury. Martin Chess entered a plea of nolo contendere; the defendant Saladino was granted a continuance. All of the appealing defendants were found guilty; all were sentenced to imprisonment, and all but Barletta were fined.

The appeals were consolidated and were briefed and argued together. The record in the case is most voluminous.

In the last analysis, the government's case against the respective defendants is based on the results of a wiretap of a pay telephone located in the Northside Social Club, also known as The Trap, located at 1048 East Fifth Street in Kansas City, Missouri. The local number of the telephone is or was 421-8727. The building in which The Trap is or was located is owned by the defendant, Nicholas Civella, and it appears that the establishment was operated at relevant times by the defendant, Tousa.

The wiretap interception was authorized by Judge Collinson on January 7, 1970 on the application of David H. Martin, a Special Attorney of the Department of Justice assigned to the Kansas City "strike force."[3] The authorizing order was entered pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*, hereinafter called the Act.

The interception was authorized for a period of ten days beginning on January 8, 1970. The last interception was effected on January 16 or January 17. On the date last mentioned Judge Collinson issued a warrant commanding the search of certain premises and the seizure of certain

[2] Practically all of the motions were passed upon by Chief District Judge William H. Becker.

[3] See 28 U.S.C. § 515.

materials; the warrant was executed and some seizures of gambling records and paraphernalia took place.

The validity of the conviction of the defendants hinges upon the validity of the authorizing order and upon whether after the interception was terminated there was adequate compliance with the inventory provisions of 18 U.S.C. § 2518(8)(d). All of the defendants contend for reversal that the Act was substantially violated, and that the results of the wiretap and evidence obtained as a result of the tap should have been suppressed as provided by § 2515 and § 2518(10)(a).

In addition, the defendants contend jointly that Title III of the Act is unconstitutional, and that the proceedings against them were invalidated by the participation therein of strike force attorneys, including Special Attorney Martin.

The defendant Fontanello contends separately that in any event the evidence against him, including the results of the wiretap, was insufficient to sustain his conviction.

Apart from the ultimate fact of guilt or innocence, the background facts of the case are not in serious dispute.

Nicholas Civella is well known to both state and federal law enforcement officers. He is at least supposed to be the leader or one of the leaders of organized crime in the Kansas City area. His activities in the field of illegal gambling and those of his associates were the subject of intensive FBI investigation for months before wiretap authorization was sought from the district court. The investigation produced a great deal of information from confidential informants who for obvious reasons would have been unwilling to testify in court to what they told the FBI.

In view of the stipulation that has been mentioned, there is no question that during the period defined in the indictment, which period extended from about July 1, 1968 to

about January 17, 1970, Nicholas Civella and the other defendants, with the possible exception of Fontanello, were engaged in a conspiracy to violate 18 U.S.C. §§ 1084 and 1952 and that overt acts in furtherance of the conspiracy was committed.

The object of the conspiracy was to engage on a large scale in bookmaking gambling prohibited by Missouri law, V.A.M.S. 563.350 and 563.360. Wagers were accepted on such sporting events as football and basketball games, and at times wagers that had been accepted were "laid off" with other gamblers to protect the conspirators from loss. Like all large bookmaking operations, this one involved the extensive use of telephone communications including both long distance and local and interstate and intrastate calls.

The FBI's investigation led it to conclude that the bookmaking operation was being conducted principally by the defendants Anthony Civella and Tousa for their own benefit and for the benefit of Nicholas Civella. It was also concluded that The Trap was a principal center of the operation, and that the pay telephone that has been identified was being used at least by Tousa in the carrying on of the business of the operation.

On the basis of the FBI investigation and after the results of that investigation had been considered in the Department of Justice, Special Attorney Martin was authorized to apply to the district court for a wiretap order as provided by § 2518(1). He made the application, and it was granted by Judge Collinson after an ex parte hearing. The authority listed no one but Tousa as a prospective interceptee, and the authority was limited to times during which Tousa was observed to be present physically on the premises of The Trap, and no conversation was to be monitored or recorded unless the FBI agents conducting the tap were able to establish by voice recognition the fact that Tousa was one of the parties to the conversation.

After the wiretap was terminated, Judge Collinson directed that inventories be served on Tousa, the Civellas, and on two other individuals who were not indicted. While the inventories should have been served not later than ninety days after the expiration of the authorized period of the interception they were not in fact served within that period of time, although they were served soon after that period expired. No order was ever entered directing service of inventories on Barletta or Fontanello, and neither was ever served with an inventory.

Three indictments have been returned in the case. The first indictment, returned in October, 1970, and the second indictment, returned in March, 1971, did not name either Barletta or Fontanello as a party defendant. They were brought into the case when the third indictment, the one with which we are concerned, was returned in October, 1971.

Due to the large number of motions filed by the defendants, and perhaps for other reasons, the case remained in the district court from October, 1971 until it was disposed of finally in the spring and summer of 1975.

Other facts will be stated as the opinion proceeds.

I.

We take up first and deal briefly with the defendants' attack on Title III of the Act and with their complaint about the strike force attorneys.

As to the complaint last mentioned, counsel for the defendants take note of the adverse holdings of this court in *DiGirlamo v. United States*, 520 F.2d 372 (8th Cir.), *cert. denied*, _____ U.S. _____ (1975); *United States v. Agrusa*, 520 F.2d 370 (8th Cir. 1975); and *United States v. Wrigley*, 520 F.2d 362 (8th Cir.), *cert. denied*, _____ U.S. _____ (1975); *see also Scott v. United States*, 522 F.2d 621

(8th Cir. 1975). Counsel state that the point is raised for record purposes only; it is not argued in the briefs, and we reject the contention.

Likewise, counsel recognize that we have upheld as constitutional Title III of the Act. *United States v. John*, 508 F.2d 1134 (8th Cir.), *cert. denied*, 421 U.S. 962 (1975); *United States v. Wolk*, 466 F.2d 1143 (8th Cir. 1972); and *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974). We adhere to those decisions.

Moreover, we deem it well to say that we agree with the district court that Special Attorney Martin was properly authorized under § 2516 to apply for wiretap authority. And we find, in general and subject to the particular objections of the defendants, that the application and order authorizing the wiretap complied with the requirements of the Act in form and content.

II.

Title III of the Act sets out a detailed procedure whereby district judges are authorized to grant authority to the FBI and other law enforcement agencies to intercept electronically for limited periods of time, not to exceed thirty days, oral and wire communications in cases in which crimes of certain types, including violations of 18 U.S.C. §§ 1084 and 1952 are being investigated. The granting of such authority is circumscribed by stringent conditions designed to protect persons from illegal or unreasonable interceptions and to minimize interceptions of communications which are not subject otherwise to interception.

18 U.S.C. § 2515 provides in general that if an interception is conducted in violation of Title III, the results of the interception and evidence developed from the interception are not admissible in evidence in a number of

types of proceedings, including grand jury proceedings and criminal trials. Specific grounds for suppression are set out in § 2518(10)(a). Moreover, a person who is aggrieved by an unlawful interception is given a civil action for damages, both actual and punitive, and, in addition, may recover a reasonable attorney's fee. 18 U.S.C. § 2520.

As far as this case is concerned, the most important section of the statute is 18 U.S.C. § 2518, the various subdivisions of which prescribe procedures for the obtaining of wiretap authority, the conditions under which such authority may be granted, the persons who must be identified as those whose communications will be intercepted, the findings that must be made before authority can be granted, and the proceedings that must take place after an authorized interception has come to an end or after the authorized period for an interception has expired.

It is established that not every violation of § 2518 calls for suppression; minor violations or noncompliance may be ignored. However, it is also established that if there is a substantial violation of a provision of the statute that is central or functional in promoting the congressional purpose to prevent abuses in wiretapping, suppression may be required even though the violations do not amount to constitutional deprivations. *United States v. Chavez*, 416 U.S. 562 (1974); *United States v. Giordano*, 416 U.S. 505 (1974); *United States v. Kahn*, 415 U.S. 143 (1974). *See also*, in addition to the Eighth Circuit cases cited heretofore, *United States v. Donovan*, 513 F.2d 337 (6th Cir. 1975); *United States v. Bernstein*, 509 F.2d 996 (4th Cir. 1975); *United States v. Doolittle*, 507 F.2d 1368, *adhered to on rehearing en banc*, 518 F.2d 500 (5th Cir. 1975); *United States v. Chun*, 503 F.2d 533 (9th Cir. 1974); and *United States v. Martinez*, 498 F.2d 464 (6th Cir.), *cert. denied*, 419 U.S. 1056 (1974).

While we think that the Act, like other statutes, must be construed and applied with practicality and that ordinarily

substantial, rather than literal, compliance with its terms suffices, particularly where the government has acted in good faith and where an affected person has sustained no prejudice as a result of an absence of literal compliance, still it must be recognized that the Act expresses a strong public policy against unnecessary, unreasonable or indiscriminate wiretapping. And where there is a substantial violation of a central and significant provision of the Act, suppression may be required even where the government has acted in good faith and the party whose communications have been intercepted has sustained no actual prejudice as a result of the violation.

In *Chun*, *supra*, which was decided soon after the Supreme Court decisions in *Chavez* and *Giordano*, both *supra*, the Court of Appeals for the Ninth Circuit laid down certain guidelines for determining whether a violation of Title III of the Act calls for suppression of the results of a wiretap; it said:

> In resolving this issue, *Chavez* and *Giordano* suggest that there are several important factors which should be considered. As an initial matter, it must be determined whether the particular procedure is a central or functional safeguard in Title III's scheme to prevent abuses. *Chavez*, *supra*, 416 U.S. at 578, . . .;*Giordano*, *supra*, 416 U.S. at 516 . . . . If this test has been met, it must also be determined whether the purpose which the particular procedure was designed to accomplish has been satisfied in spite of the error. *Chavez*, *supra*, 416 U.S. at 573-574, . . . ; *Giordano*, *supra*, 416 U.S. at 524-528 . . . . While in most situations it would not be necessary to reach beyond the above-mentioned factors, it may be that in some instances they will not be completely determinative. In such cases, *Chavez* implicitly suggests a third factor which may have a bearing

217-082 O - 76 - 3

on the issue — i.e. whether the statutory requirement was deliberately ignored; and, if so, whether there was any tactical advantage to be gained thereby.

503 F.2d at 542.

III.

It is first claimed that the application filed by Special Attorney Martin and the order based thereon did not comply with the requirements of § 2518(1)(b) and were fatally defective because the application recited that it was based on an affidavit by FBI Special Agent Spencer Hellekson and that a copy of his affidavit was attached to the application, whereas in truth and in fact no affidavit of Hellekson was attached to the application and no such affidavit was presented to the district court. We find that contention to be without merit.

It is true that the Martin application erroneously stated that it was supported by Hellekson's affidavit, but the error did not influence Judge Collinson or anyone else in concluding that wiretap authority should be granted, and it did not prejudice the defendants. Therefore, it can be ignored. *Cf. United States v. Chavez, supra,* 416 U.S. at 573-80; *United States v. Schaefer,* 510 F.2d 1307, 1310 (8th Cir.), *cert. denied,* 421 U.S. 975 (1975); *United States v. Thomas,* 508 F.2d 1200, 1203 (8th Cir.), *cert. denied,* 421 U.S. 947 (1975); *United States v. John, supra,* 508 F.2d at 1137; *United States v. Brick,* 502 F.2d 219, 222-23 (8th Cir. 1974).

The record makes it clear that at least two Special Agents of the FBI were concerned in the investigation. One of them was Mr. Hellekson, and the other was Special Agent William N. Ouseley. The original affidavit in support of the application was prepared and signed by Hellekson and was

mentioned in the application that was prepared at about the same time. However, when the Hellekson affidavit was considered in the Department of Justice it was found to be insufficient in content. A new affidavit was then prepared and executed by Ouseley, and that was the affidavit that was ultimately submitted to and considered by Judge Collinson on January 7, 1970. The whole problem arises from the fact that Mr. Martin simply failed to change his original application that mentioned the Hellekson affidavit.

We agree with Chief Judge Becker that the error was merely clerical and that it did not substantially affect the sufficiency of the application or the judicial action thereon.

IV.

The next contention is that the application and the order based thereon violated §§ 2518(1)(b)(iv) and 2518(4)(a) in that they did not identify any defendant other than Tousa as a person whose communications would be intercepted.

Section 2518(1)(b)(iv) provides that the application must identify the person "if known" committing the offense and whose communications are to be intercepted. And § 2518(4)(a) states that the authorizing order must specify the identity of the person "if known" whose communications are to be intercepted.

Relying on cases like *United States v. Kahn, supra; United States v. Donovan, supra;* and *United States v. Bernstein, supra,* defendants argue that as of January 7, 1970 the government had probable cause to believe that at least the Civellas were involved in the conspiracy, and that their communications, as well as those of Tousa, would be intercepted. Hence, it is contended that the application and order were fatally defective in naming Tousa as the sole interceptee.

An argument subsidiary to the one just mentioned is that the district court erred in overruling a motion for an evidentiary hearing filed shortly before final submission of the case to the district court, the purpose of which hearing was to establish the existence of probable cause with respect to the Civellas and perhaps as to Barletta and Fontanello as well.

The arguments in question are clearly unavailable to Tousa who was named in the application and order. It is not entirely clear to us whether those arguments are put forward as to all of the other four defendants or whether they are actually limited to Nicholas Civella and Anthony Civella. However, the ultimate view that we take of the case renders it unnecessary for us to decide whether the government had probable cause to believe on January 7, 1970 that Barletta and Fontanello were committing the offenses under investigation and would likely be in communication with Tousa on the telephone located in The Trap or whether the district court erred when it refused to grant the evidentiary hearing requested by the defendants substantially more than three years after the indictment had been returned and after Judge Becker had denied the plethora of earlier motions filed by the defendants jointly and singly after the return of the instant indictment in October, 1971. Further discussion in this section of the opinion will be limited to the principal argument that has been mentioned as that argument is applicable to the Civellas.

It is obvious from the record that for many months prior to January 7, 1970 the government had probable cause to believe that Nicholas and Anthony Civella were involved with Tousa in an illegal gambling operation in which the telephone in The Trap would be used. The question, however, is whether on or before the date of the application for the wiretap authority the government had probable cause to believe that either Nicholas Civella or Anthony

Civella would be in communication with Tousa on the target telephone.

The record reflects that Special Agent Ouseley filed two detailed affidavits outlining what had been done and learned in the course of the over-all investigation of the suspected conspiracy. One of those affidavits was the one relied on by Judge Collinson in granting the wiretap application; the other, filed on January 17, 1970 in support of an application for a search warrant, is largely a repetition of the first.

Accepting as true the statements appearing in those affidavits, it appears that prior to January 7, 1970 the government had probable cause to believe that Nicholas Civella was the head or one of the leaders of an extensive criminal organization in Kansas City which organization is referred to at times as "the outfit"; that the bookmaking under investigation was an "outfit" operation; that Anthony Civella and Tousa were actively carrying on the operation as subordinates of Nicholas Civella; that Anthony Civella was obtaining daily wagering information from the defendant Chess in Las Vegas, Nevada, and that Tousa was obtaining similar information from other sources; that The Trap was the center or a principal center of the operation; and that Tousa was making extensive use of the phone in the prosecution of the business of the operation.

Granting that the government had reasonable cause to believe that the facts above stated existed, it seems unrealistic to us to say that the government did not have reasonable cause to believe that at some stage during the wiretap period Tousa would be in communication with the respective Civellas or they with him by means of the target telephone, and that the communications would be intercepted. And in this connection, it is to be observed that the indictment charges, among other things, that it was a part of the conspiracy that Anthony Civella would pass on

to Tousa the "sports line" that the former was receiving from Las Vegas. While the government probably did not have actual knowledge of that fact prior to the interceptions, we think that the government did have probable cause to believe prior to January 7 that Anthony Civella and Tousa would exchange information and that the telephone at The Trap would probably be used to that end.

It follows, therefore, that in order to comply literally with the relevant subsections of the statute it was necessary for the government to identify the Civellas in the application and for the district court to identify them, as well as Tousa, in the authorizing order. That, of course, was not done, but after the wiretap had come to an end, both Civellas along with Tousa were ordered to be served with inventories as provided by § 2518(8)(d), and they were served with inventories.

The question on this phase of the case, then, is whether the failure to comply literally with the requirements of §§ 2518(1)(b)(iv) and 2518(4)(a) invalidated the order of January 7 as far as the Civellas were concerned and required the suppression as to them of the results of the wiretap and evidence discovered by reason of those results.

The decision of the Supreme Court in *United States v. Kahn, supra,* was a negative one to the effect that where the government does not have reasonable cause to believe that an individual is involved in a criminal operation that will probably involve him in culpable communications by means of a target telephone, the government is not required to name him in the initial application for wiretap authority and the district court is not required to identify him in the authorizing order, although in its discretion the district court later may order him to be served with an inventory as provided by § 2518(8)(d).

Kahn can be read as holding, in converse, that where the government has probable cause to believe that a number of persons are involved in criminal conduct and that their communications in connection with that conduct are likely to be intercepted if certain wiretap authority is granted, it is mandatorily required that all of those persons be identified as prospective interceptees in both the application for the authority and in the authorizing order, and that a failure to do so constitutes a violation of a central and significant requirement of the statute and requires suppression of wiretap results as to the unidentified persons even though they receive notice later that their conversations have been intercepted.

The *Kahn* case has been so read in *United States v. Donovan* and *United States v. Bernstein,* both *supra.* A different result has been reached by the majority of a divided Court of Appeals for the Fifth Circuit in *United States v. Doolittle, supra.*[4]

In *Doolittle,* as here, plural defendants were indicted for violations of 18 U.S.C. § 1084 and § 1952, and, as here, the government's case was based on the results of an authorized wiretap. As to three defendants the government when it obtained the wiretap authority had probable cause to believe that they were involved in the offense and that their communications would probably be intercepted. They were not identified in the application or in the authorizing order. However, the district court later directed that inventories be served on them; they were served on the defendants in question; the tape recordings of their conversations were made available to them, and they sustained no prejudice as a result of not being identified originally. The district court denied their motions to suppress; they were convicted and appealed.

[4] According to the current issues of Shephard's Federal Citations, Part I, petitions for writs of certiorari in all three of those cases are now pending in the Supreme Court.

A majority of a three-judge panel of the Court of Appeals affirmed the conviction. It was said:

> The wiretap authorization referred to "Billy Cecil Doolittle and others as yet unknown." Anderson and Baxter contend that the Government had reasonable cause to believe that their conversations would be intercepted. Relying on certain language in the Supreme Court's opinion in *Kahn*, they argue that, not being "unknown," they should have been named in the authorization. They contend that since they were not named, the wiretap order was illegal as to their conversations. The same argument could be made for Sanders. We reject this argument. The defendants neither allege nor demonstrate any prejudice to them in not being named in the authorization. The Government contends that its agents had personal knowledge, as opposed to information, to support probable cause as to illegal activity only of Doolittle, the co-owner of the Sportsman's Club, the establishment wherein the telephones were located and to which the telephone bills were sent. All defendants received an inventory of the intercepted conversations, were allowed to listen to the tapes and received transcripts of the conversations prior to use against them at trial, as if they had been named in the order. Most of the conversations of each defendant were with Doolittle, the person named in the order. There is no indication of bad faith or attempted subterfuge by the Government in its wiretap application. The application and affidavit delineated specifically the information expected to be gathered from the tap. We hold there was substantial compliance with the requirements of the Act, and that the failure to name other defendants does not render the evidence obtained as to

> them inadmissible under 18 U.S.C.A. § 2518(10)(a).
>
> 507 F.2d at 1371-72.

The defendants moved for rehearing en banc, and their application was granted. 507 F.2d at 1377. The case was heard en banc by fourteen of the fifteen Circuit Judges in regular commission; an eight-judge majority voted to uphold the panel decision and expressed their view in a per curiam opinion. 518 F.2d at 500-01. Chief Judge Brown and Circuit Judges Wisdom, Goldberg and Simpson joined Judge Thornberry in the dissent that he filed as a member of the original panel. 518 F.2d at 501. Judge Goldbold filed a separate dissent in which he differed not only with the majority but also to a certain extent with his fellow dissenters. 518 F.2d at 501-04.

The question is not without difficulty because we have no doubt that the initial identification requirements of the statute are central and significant requirements and are not lightly to be ignored. However, we, like the majority of the *Doolittle* court, are unwilling to say that a defendant who ought to have been identified initially is automatically entitled to have evidence of his communications suppressed merely because he was not identified originally as a potential interceptee.

We think that if the identification requirements of the Act are satisfied with respect to the individuals who are identified originally, and if defendants who were not identified originally, although they should have been, are promptly notified in substantial compliance with § 2518(8)(d) of the fact and circumstances of the interception of their communications so that they may apply to the issuing judge for an order making available to them the contents of the intercepted communications, the purpose of §§ 2518(1)(b)(iv) and 2518(4)(a) has been achieved and that there has been a sufficient substantial compliance with those subsections.

In the instant case there is nothing to suggest that the government acted in bad faith or with deceptive intent when it failed to identify the Civellas in the application, or that it had anything to gain by not naming them, or that Judge Collinson would have acted differently than he did had the Civellas been named. When the matter reached the stage at which the inventory requirements of § 2518(8)(d) came into play, counsel for the government brought the Civellas to the attention of the district judge to the end that they might be served with inventories. Inventories were served on them and the recordings of their conversations were made available to them well in advance of final submission of the case.

Therefore, we reject the contentions of the Civellas based on noncompliance with §§ 2518(a)(b)(iv) and 2518(4)(a).

V.

The remaining contention made by the defendants jointly is based on alleged noncompliance with § 2518(8)(d) which has already been mentioned from time to time.

Insofar as here pertinent, that subsection provides that within a reasonable time but no more than ninety days after the expiration of an authorized interception period the judge authorizing the interception must cause inventories to be served on all persons mentioned in the order and may in his discretion order that inventories be served on such other parties as the judge determines should be served in the interests of justice. The inventory must reveal the fact of the entry of the order; the date of the entry and the period of approval of the interception; and the fact that communications of the person involved were or were not intercepted. And the subsection then goes on to provide that the district judge may in his discretion make available to such person or his attorney for inspection such portions of the intercepted communications and of the application and

order as the judge determines to be in the interest of justice. While the subsection permits the district judge on ex parte application and for good cause shown to postpone the service of inventories, he is not given any authority to dispense with them altogether.

The Civellas and Tousa concede that they were served with inventories, but they complain that they were not served within the statutory ninety day period.

As stated, Barletta and Fontanello were not indicted until October, 1971; Judge Collinson never entered an order directing that § 2518(8)(d) inventories be served on them, and they were never served with such inventories. It was only after they were indicted that they received any direct and positive knowledge that conversations of theirs had been intercepted and had made available to them the tapes of the recordings of the conversations involving them.

The interception period ended on January 18, 1970, and the ninety day period for the serving of inventories expired on April 18 of that year. On March 27, 1970 Judge Collinson ordered inventories served on the Civellas, Tousa and certain other persons, not including Barletta and Fontanello. Since the Civellas and Tousa were local people, the marshal should have had no difficult in effecting service well within the ninety day period. However, for some reason not disclosed by the record Tousa was not served until April 23, 1970 which was five days after the expiration of the ninety day period, and the Civellas were not served until May 1, 1970 which was thirteen days after the expiration of the ninety day period.

A § 2518(8)(d) problem was squarely presented to this court in *United States v. Wolk, supra.* In that case the time for serving inventories, as extended, expired on June 30, 1971. The prospective defendants were arrested before indictment on June 21 and June 22. On June 22 the district court ordered inventories served on all of the defendants,

and the inventories were placed in the hands of the marshal for service; by June 24 all of the defendants save three had been served. The defendants were indicted on June 25. The three defendants who had not been served with inventories were arraigned in July and August. By the time of arraignment counsel for all three of those defendants had received copies of the application, supporting affidavit, and the order authorizing the interception. After the arraignments counsel for all of the defendants were permitted to inspect and copy both the original tapes and the transcript of the recordings. Two of the three defendants in question were not served inventories until September 4, 1971, and the third one was never served with an inventory.

As to those three defendants, the district court suppressed the results of the wiretap, and the government appealed. This court reversed. It was held that in spite of the delay in serving inventories on two of the three appellees and in spite of the fact that one of them was never served with an inventory, there had been substantial compliance with § 2518(8)(d). It was emphasized that there was no showing of intentional violation of the statute, and that the defendants had not been prejudiced by the lack of compliance with the statute.

While there are points of distinction between *Wolk* and the instant case, it would appear that application of *Wolk*, as such, to this case, would probably result in a rejection of the contention of at least the Civellas and Tousa. *Wolk*, however, was decided substantially prior to the *Giordano* and *Chavez* decisions of the Supreme Court, a point specifically noted in *United States v. Donovan, supra*, 513 F.2d at 343, and perhaps too much reliance should not be placed on it today.

Although § 2518(8)(d) does not come into play until after a wiretap has been completed, still it has been held to be a substantial and functional part of the congressional policy of limiting wiretapping. *United States v. Donovan, supra*,

513 F.2d at 343-44, and *United States v. Chun, supra*, 503 F.2d at 542, and we shall so consider it.

We take up, first, the § 2518(8)(d) claim of the Civellas and Tousa. It does not appear to us that the statute was deliberately ignored, or that the government undertook to delay service of the inventories on those defendants or that it had anything to gain by the delays which were extremely short as compared to those involved in *Wolk*. Nor, in our opinion did the delays prevent the purpose of § 2518(8)(d) from being achieved. The purpose of that subsection is to insure that a person whose communications have been intercepted receives notice of that fact within a comparatively, though not extremely, short period of time after the expiration of the interception period. Had the inventories been served promptly, and we do not know why they were not served promptly, § 2518(8)(d) would have been satisfied literally, and we do not consider that the five day delay in the case of Tousa and the thirteen day delay in the case of the Civellas were significant. As indicated, Tousa was served in late April, 1970, and the Civellas were served on May 1 of that year. The first indictment was not returned until October.

We conclude, therefore, that there was substantial compliance with the inventory requirements of the statute as far as Tousa and the Civellas were concerned, and we reject their § 2518(8)(d) contention.

A quite different situation is presented with respect to Barletta and Fontanello. As to them, no effort was made to comply with the inventory requirements of the statute and those defendants received no notice of the interceptions of their communications until the third indictment was returned nearly two years after the authorized wiretap had come to an end. And it would be stretching things too far to say that the fact that they received full information about the interceptions after they were indicted in the fall of 1971 amounted to a substantial compliance with the statute. The wiretap evidence should have been suppressed as to them.

VI.

From what has been said, it follows that the convictions of Tousa and the Civellas will be affirmed. The convictions of Barletta and Fontanello will be reversed, and the cause remanded with directions that judgments of acquittal be entered as to them.

The disposition that we make of Fontanello's case makes it unnecessary for us to determine whether in any event the evidence was sufficient to support his conviction. We will say that the evidence against him was extremely weak and consisted of nothing but the interception which an FBI expert placed on one ambiguous conversation on the telephone between Fontanello and Tousa.

Affirmed as to Nicholas Civella, anthony Thomas Civella and Frank Anthony Tousa.

Reversed and remanded with directions as to Joseph Barlett and Thomas Fontaneilo.

A true copy:

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 75-1530 **September Term, 1975**

The United States,
Appellee,

vs.

Joseph Barletta,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the original designated record of the United States District Court for the Western District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and commitment of the said District Court in this cause be and the same is hereby reversed.

And it is further ordered by this Court that this cause be the same is hereby remanded to the said District Court for proceedings consistent with this Court's opinion.

April 16, 1976

A true copy.

Attest:

/s/ Robert C. Tucker
Clerk, U.S. Court of Appeals, 8th Circuit.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 75-1532 **September Term, 1975**

The United States,
Appellee,

vs.

Thomas Fontanello,
Appellant.

Appeal from the United States District Court for the Western District of Missouri.

This cause came on to be heard on the original designated record of the United States District Court for the Western District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be and the same is hereby reversed.

And it is further ordered by this Court that this cause be and the same is hereby remanded to the said District Court for proceedings consistent with this Court's opinion.

April 16, 1976

A true copy.

Attest:

/s/ Robert C. Tucker
Clerk, U.S. Court of Appeals, 8th Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1975.

Appeals from the United States District Court for the Western District of Missouri

75–1530

THE UNITED STATES, APPELLEE

vs.

JOSEPH BARLETTA, APPELLANT.

75–1532

THE UNITED STATES, APPELLEE

vs.

THOMAS FONTANELLO, APPELLANT.

Petition of appellee for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

JUNE 9, 1976.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Criminal Action No. 23562–2

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

NICHOLAS CIVELLA, THOMAS "DUDE" FONTANELLO, FRANK ANTHONY TOUSA, ANTHONY THOMAS CIVELLA, MARTIN CHESS, A/K/A "HARVEY," JOSEPH "KING" BARLETTA, AND PHILLIP "BING" SALADINO, DEFENDANTS.

MEMORANDUM OPINION AND JUDGMENT

Four of the defendants charged in this Indictment, namely, Nicholas Civella, Frank Anthony Tousa, Anthony Thomas Civella and Joseph "King" Barletta, have executed written waivers of a jury trial which have been filed by the Court and consented to by the attorneys for the Government. At an appearance in open court, the Court addressed each of these defendants personally and established to the Court's satisfaction that these waivers were executed knowingly and as the free act of each of these defendants and the waivers of jury trial are accepted and approved by the Court.

These same four defendants and counsel for the Government have executed a stipulation of facts pertaining solely to Count V of this Indictment, which

further provides that the parties stipulate that Count V shall be severed from the remaining counts of the Indictment and tried first by the Court and decided solely from the facts made a part of the stipulation. All parties expressly waived their rights to call and confront witnesses and to introduce any additional evidence.

The stipulation also contains a lengthy recital (rather ineptly worded), which recites that upon the basis of the Government's exhibits, listing them by number, and evidence derived therefrom consisting of testimony of witnesses and gambling records and paraphernalia obtained pursuant to such search warrants, "the following facts are proved" and then follows a recital of the allegations of Count V of the Indictment charging these defendants with violation of section 371, Title 18, United States Code.

After consideration of the facts recited in this stipulation, this Court finds that each of these four named defendants are guilty as charged in Count V of this Indictment. It is therefore

Ordered and Adjudged that Nicholas Civella, Frank Anthony Tousa, Anthony Thomas Civella and Joseph "King" Barletta are each found guilty as charged in Count V of this Indictment. It is further

Ordered that the United States Parole and Probation Office of the Western District of Missouri prepare a pre-sentence investigation of each of these defendants, to be furnished to the Court within four weeks from this date. The date for sentencing will be set by the Court at the time the pre-sentence reports are received. Each of the defendants will remain on his present bond until the date of sentencing.

(signed)

WILLIAM R. COLLINSON,
District Judge.

Dated: May 14, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Criminal Action No. 23562-2

UNITED STATES OF AMERICA, PLAINTIFF.

vs.

THOMAS "DUDE" FONTANELLO, ET AL., DEFENDANTS.

MEMORANDUM AND JUDGMENT

Defendant was tried on Count V of this indictment before the Court after a duly executed waiver of jury trial. Defendant fully stipulated all the facts establishing the conspiracy charged in Count V of the indictment, except the one crucial fact as to whether or not this defendant was a co-conspirator or a member of the conspiracy in any way.

The Court heard the evidence introduced by the Government on this sole issue, the defendant offering no evidence. The only evidence considered by the Court in arriving at his judgment was the one taped telephone conversation, admittedly between this defendant and one of the admitted conspirators, which this Court finds establishes beyond a reasonable doubt that this defendant was a member of the conspiracy. The Court expressly does not find that the testimony of the agent that in his opinion this defendant was an unidentified person referred to by a nickname by the other conspirators in other conversations has any probative value establishing guilt of this defendant. Similarly, the Court has to rule that the one reference

to this defendant by other admitted conspirators in another taped telephone conversation has no probative value in establishing the guilt of this defendant, because of the elementary rule that the existence of a conspiracy to which this defendant is a party must be established before statements of co-conspirators are admissible against him.

In view of the magnitude of this gambling operation, and the testimony of the FBI expert on how such operations are set up and conducted, this Court has no difficulty in finding beyond any reasonable doubt that the one conversation of this defendant establishes that he was a member of the conspiracy, sharing in the profits and losses of the operation. It is therefore

Ordered, Adjudged and Decreed that defendant Thomas "Dude" Fontanello be, and is hereby, adjudged guilty of the charges in Count V of the indictment herein.

(signed)

WM. R. COLLINSON,
District Judge.

Dated: May 29, 1975.

APPENDIX E

18 U.S.C. 2510 *Definitions*

* * * * *

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. 2517 *Authorization for disclosure and use of intercepted wire or oral communications*

* * * * *

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of the communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

* * * * *

18 U.S.C. 2518 *Procedure for interception of wire or oral communications*

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such

application. Each application shall include the following information:

* * * * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

* * * * *

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

* * * * *

(8)(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7)(b) which is denied or the termination of the period of an order of extensions thereof, the issuing or denying judges shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. * * *

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1978

No. 76-169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA,
Petitioner

v.

JOSEPH BARLETTA

UNITED STATES OF AMERICA,
Petitioner

v.

THOMAS FONTANELLO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

EDWARD P. MORGAN
KEVIN T. MARONEY

Welch, Morgan & Kleindienst
300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 296-5151

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-169

UNITED STATES OF AMERICA,
Petitioner *Petitioner*

v.

JOSEPH BARLETTA

UNITED STATES OF AMERICA,
Petitioner

v.

THOMAS FONTANELLO

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., pp. 1a-22a) is reported at 533 F.2d 1395. The opinions of the district court (Pet. App., pp. 27a-30a) are not reported.

JURISDICTION

The judgments of the court of appeals (Pet. App., pp. 23a-24a) were entered on April 16, 1976. A petition for rehearing was denied on June 9, 1976 (Pet. App., p. 25a). On June 30, 1976, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including August 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the Government's failure to comply with the "service of inventory" requirements of 18 U.S.C. 2518(8)(d) warrants suppression of the wiretap evidence, in circumstances where the respondents were not named in the wiretap warrant, where the Government made no effort to comply with the inventory requirements as to them, and where the first notice of their having been overheard was given them after their indictment, almost two years after the termination of the tap.[1]

STATUTE INVOLVED

Section 2518 of 18 U.S.C. provides in pertinent part:

"§2518. Procedure for interception of wire or oral communications.

* * * * *

[1] An additional question, raised in the court of appeals as to the respondent Fontanello, is shown by the following discussion in the opinion of the court below: "The disposition that we make of Fontanello's case makes it unnecessary for us to determine whether in any event the evidence was sufficient to support his conviction. We will say that the evidence against him was extremely weak and consisted of nothing but the interpretation which an FBI expert placed on one ambiguous conversation on the telephone between Fontanello and Tousa." (Pet. App., p. 22a).

"(8) . . .

"(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of —

"(1) the fact of the entry of the order or the application;

"(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

"(3) the fact that during the period wire or oral communications were or were not intercepted. . . ."

* * * * *

"(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval. . . ."

STATEMENT

Respondents were indicted in the fall of 1971 in the Western District of Missouri for alleged gambling activities, along with Nicholas Civella, Anthony Thomas Civella, Frank Anthony Tousa, Martin Chess and Philip Saladino.[2]

After pre-trial motions were heard and determined by Chief District Judge William Becker, the respondents and the two Civellas and Tousa were tried on Count V only by District Judge William Collinson. Respondent Fontanello waived jury trial, and was tried to the court; the others also waived jury trial and were tried by the court on a written stipulation of facts. (R. 1089) The principal evidence relied on by the government came from a wiretap and a pen register (R. 465; R. 1095) placed pursuant to orders of the district court on a pay telephone at the Northview Social Club in Kansas City, Missouri, during the period between January 8, 1970, and January 17, 1970. (R. 276).

All five were convicted and all five appealed.

The court of appeals affirmed the convictions of Nicholas and Anthony Civella and Frank Tousa,[3] but reversed as to the respondents because of the Government's total failure to comply with the requirements of 18 U.S.C. 2518 (8)(d) as to them.

[2]Chess entered a plea of nolo contendere to one count, and Saladino's case was severed and awaits trial.

[3]The Civellas and Tousa have petitioned this Court for a writ of certiorari (No. 75-1813).

The court below drew a distinction between the Government's late service of inventories on the Civellas and Tousa (13 days and 5 days late, respectively), which the court regarded as a "substantial compliance" in the absence of prejudice, and the 21-month delay in notification of the overhearings as to both respondents. The court observed that "it would be stretching things too far to say that the fact that they received full information about the interception after they were indicted in the fall of 1971 amounted to a substantial compliance with the statute." (Pet. App., p. 21a).

ARGUMENT

The petition contends (p. 5) that the issue presented in this case is presently before this Court in *United States v. Donovan*, No. 75-212. But that is not wholly the case.

The court of appeals in this case agreed with the Government's basic contention on the issue posed, i.e., that failure to meet the literal time requirements of Section 2518 (8)(d) does not automatically warrant suppression of the wiretap evidence.

As a matter of fact the court affirmed the convictions of respondents' three co-defendants despite delays of 5 and 13 days in service of inventories on them.[4] The court reasoned that such a brief delay, when unaccompanied by prejudice or governmental bad faith, is a "substantial compliance" with the requirement of the statute. (Pet. App., p. 21a.).

But the court of appeals perceived the situation as to the respondents to be "quite different," since "no effort was made to comply with the inventory requirements of the statute and those defendants received no notice of the interceptions of their communications until the third in-

[4]Those co-defendants in the district court have petitioned for certiorari on that and other grounds in No. 75-1813, filed June 16, 1976.

dictment was returned nearly two years after the authorized wiretap had come to an end." (Pet. App. A, p. 21a)

Accordingly, this Court's disposition of *Donovan* or of *Civella* will not necessarily affect the reversal in this case by the court below.

Section 2518 (8)(d) requires the judge issuing a wiretap order to cause to be served an inventory, no later than 90 days after termination of the wiretap, on the persons named in the wiretap order and on "such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice." If this requirement applies to anyone, it certainly applies to one who was overheard and whom the government contemplates for indictment.

It therefore follows that the prosecution staff, which sought and conducted the wiretap, had the affirmative obligation to bring to the issuing judge's attention the names of those persons, not named in the order, who nonetheless were overheard and are being considered for prosecution as a result of the overheard conversations.[5]

To require less would abrogate the Fourth Amendment notice requirements enunciated by this Court in *Berger v. New York*, 388 U.S. 41, at p. 60.

It is true that lower courts have divided on the question whether *any* violation of this central and functional safeguard requires suppression of the wiretap evidence. See, e.g., *United States v. Donovan*, 513 F.2d 337, certiorari granted, No. 75-212, and *Civella v. United States* (the companion to this case), *supra*, 533 F.2d 1395, petition for writ of certiorari pending, No. 75-1813. See also, *United*

[5]An FBI agent testified in the trial proceedings, that he recommended the indictment of respondent Fontanello prior to the first indictment. The respondents were not indicted until the third indictment was returned in the case. (Fontanello Trial Transcript, p. 84).

States v. Iannelli, 477 F.2d 999, 1003 (C.A. 3, 1973), affirmed on other grounds, 420 U.S. 770 (1975); *United States v. Wolk*, 466 F.2d 1143, 1145 (C.A. 8, 1972); and *United States v. Chun*, 503 F.2d 533 (C.A. 9, 1974), motion to suppress granted on remand, 386 F.Supp. 91, 96 (D. Hawaii, 1974).

But none of the cases, to our knowledge, which have been favorable to the government's position on this point involved a delay in notification approaching anything like a 21-month period of time.

The net effect of the government's contention in its petition for certiorari in *Donovan*, at pp. 14-15, is that Section 2518 (8)(d) serves no central or functional purpose in the statutory scheme whatever, so long as the 10-day notice requirement of 2518 (9)[6] is complied with. Presumably, therefore, under the government's interpretation, it could overhear an individual, seek an indictment four years later based in part on the overhearing, and still comply with the notice requirements of the statute and the Fourth Amendment by simply complying with Section 2518(9). But, as the court of appeals in this case said, that "would be stretching things too far." (Pet. App., o. 22a).

As a matter of fact, the notice as to introduction into evidence of the contents of a wiretap interception was not intended by the Congress to provide the notice required by the Fourth Amendment.

The section-by-section analysis in the legislative history of the statute states that the provision of 2518(8)(d) "reflects existing search warrant practice" and then cites Rule 41(c) of the Federal Rules of Criminal Procedure, *Berger v. New York*, *supra*, 388 U.S. 41 (1967) and *Katz v. United States*,

[6]That section prohibits receipt in evidence of the contents of an interception unless each party has been furnished, at least 10 days beforehand, a copy of the application and court order for the wiretap.

389 U.S. 347 (1967). See U.S. Code Congressional and Administrative News, 1968, p. 2194.

The analysis of 2518 (9) mentions neither *Berger* nor *Katz* nor the Federal Rules. "The 10-day period is designed to give the party an opportunity to make a pre-trial motion to suppress . . ." *Id.*, at p. 2195.

Although the court of appeals, in reversing as to the respondents, did not articulate a finding of prejudice occasioned by a 21-month delay in notification, it is manifest that such a long delay is inherently prejudicial. Such prejudice is particularly demonstrable when consideration is given to the facts involving the respondent Fontanello.

His conviction by the district court rests on the testimony of an FBI agent "interpreting" one ambiguous conversation on the telephone between Tousa and respondent Fontanello. (Pet. App., p. 22a).

It is palpably unfair, as well as a Fourth Amendment and statutory violation, to "seize" a telephone conversation and then fail to give notice to the interceptee until he has been formally charged after a delay of 21 months. Under such circumstances, the interceptee is put to a disadvantage of trying to recall a long-ago telephone call, which *may* have been casual, and to place it in context, which *may* subject it to a wholly different "interpretation" than might be given by an FBI "expert." (Pet. App., p. 22a).

It matters not what merit might be attached to the arguments of the government of "substantial compliance" or "lack of prejudice" in *United States v. Donovan* (No. 75-212) or in the companion case here, *Civella v. United States* (No. 75-1813). The lapse of 21 months in giving notification to a defendant of a seizure of his private conversations is beyond the pale by any judicial or statutory standard.

Accordingly, there is no occasion for this Court to grant the petition in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD P. MORGAN
KEVIN T. MARONEY
Attorneys for Respondents
Welch, Morgan & Kleindienst
300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 296-5151

September 1976